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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/062,369	01/31/2002	Stephen S. Breese	AUS920011024US1	2912
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Walder Intellectual Property Law (END)			POLLACK, MELVIN H	
C/O Walder Intellectual Property Law, P.C.				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/062,369	BREESE ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	MELVIN H. POLLACK	2469	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 27 July 2010.  
 2a) This action is **FINAL**.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-10, 12, 13, 15-24, 26, 27, 29-39, 41, 42, 44-54, 56, 57 and 59-64 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-10, 12, 13, 15-24, 26, 27, 29-39, 41, 42, 44-54, 56, 57 and 59-64 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on 29 March 2002 is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ .                                    |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____.   | 6) <input type="checkbox"/> Other: _____ .                        |

**DETAILED ACTION**

**Continued Examination**

1. In view of the amendment filed on 7/27/10, PROSECUTION IS HEREBY REOPENED.

The remarks have been responded to, as set forth below.

2. To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing below:

The application has been reopened because applicant filed based on CFR 4.39(b) 1, triggering Form Paragraph 12.187.

/Ian N. Moore/

Supervisory Patent Examiner, Art Unit 2469

**Information Disclosure Statement**

3. The listing of references in the remarks is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609.04(a) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

### **Response to Arguments**

4. Applicant's arguments filed 7/27/10 have been fully considered but they are not persuasive. An analysis of the arguments is provided below.

5. The 112 6<sup>th</sup> rejection has been withdrawn in light of the amendment and remarks (P. 15).

6. In regards to the amendments (P. 15), it is the belief of the office that the new claims represent new matter. The cited portions of support represent mere examples rather than definitions of a transaction, and applicant may not rely on outside art to read limitations into the claims. Therefore, a 112 1<sup>st</sup> rejection has been added in light of the new matter.

7. In regards to applicant's request for intervention (Pp. 16 – 17), there is no requirement that the supervisor intervene in a long pendency per se, particularly one where the long pendency is the result of the board or applicant's actions. Nevertheless, this action has been reviewed by both the SPE and a primary, and was further reviewed prior to the examiner's answer regarding the sufficiency of the arguments and supplemental answer merely adding the 112 6<sup>th</sup> rejection.

The examiner has been ratified as to the sufficiency of the art as to the original rejections, and the breadth of the newly added limitations even if they are not new matter.

8. Applicant argues that the definition of transaction is a sequence of transaction steps that may be treated as a single unit (Pp. 17 - 29), but that the transaction steps are somehow differentiated from a series of commands or script steps or a series of units with sub-steps. In fact, it seems that the current definition can include a series of scripts, since the definition is merely a unit that can be subdivided, and there is no limitation that it must be subdivided to the atomic level. Reading the definition at its narrowest example, for the sake of argument, the specification describes it as a script wherein the transaction example (specification, P. 12) is a connection transaction subdivided into multiple steps (open URL, select logon, etc.), each of which is known by one of ordinary skill in the art to be further divisible into sub-steps. In other words, they seem to have sufficient similarities to a series or hierarchy of commands that the applicant is encouraged to better differentiate transaction steps from other sub-unit divisions.

9. The closest that the applicant seems to come to a differentiation argument is the assertion that the reporting done by Chandra is done on a connection basis, which applicant claims to specifically mean that Chandra does not gather performance information for individual steps of a script (Pp. 18). In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). There is no limitation in the specification, let

alone the claims, that requires the probe to monitor a single transaction step. The collecting step requires only that "the collected data is representative of a performance of the transaction steps of the script," which certainly includes measuring the transaction in such a way that the transaction step performance can be later derived. As for the reporting step, it only requires a plurality of transaction step entries, and makes no limitation on how the entries are measured, calculated or derived.

10. Furthermore, the only other requirement of a transaction step is that it represents an interaction between a user of a client computing device and one or more applications running on a server. Setting up a connection thus fits the definition of a transaction step, even when the specification is read into the claims, provided that there be a sequence of connections that can be treated as a single unit. According to the applicant's own assertions, Chandra teaches a unit of connections, and thus fits the very definition that the applicant has asserted. Applicant has failed to show any definition or differentiation otherwise, as no claim limitation requires the transaction step to be limited to open URL.

11. Even if the claim could somehow be so narrowly construed that the transaction could be nothing other than each connection and the transaction step could be nothing other than parts of the connection, it is the position of the office that Chandra teaches this limitation. First, Chandra clearly shows that each connection may be broken into sub-steps, and the claims are written such that the execution of a transaction and monitoring and reporting of that transaction is all that is needed. Further, the claims do not preclude a measurement by a node view rather than transaction step view. Second, the cited portions show that the measurements involve running

normal connections wherein the measurements are broken up by task rather than connection (see also col. 10, line 50 – col. 11, line 40).

12. Applicant then argues that the connections and portions of connections cannot be a transaction because they are for the use of monitoring and testing a network. The claims as currently drawn do not expressly disclose a requirement as to a particular purpose of transaction. Further, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

13. Finally, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). In this case, Hershey teaches monitoring during real world conditions, and thus it is not a requirement of Chandra to teach this limitation.

14. As for claims 60 – 64, Applicant argues that the claims refer to functional material (Pp. 29 – 30). Contrary to the applicant’s assertion, the claims are not drawn towards the step of developing or ordering transaction steps, but of ordering a data. To use applicant’s analogy, a

book will convey ordered information so that a user may understand, but a book is not patentable because the step of usage must be functionality beyond the common uses of mere display.

### **Specification**

15. The amendment filed 27 July 2010 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: the added definition of transaction. The material cannot be supported by an example and external art alone.

16. Applicant is required to cancel the new matter in the reply to this Office Action.

### **Claim Rejections - 35 USC § 112**

17. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

18. Claims 1-10, 12-13, 15-24, 26-27, 29-39, 41-42, 44-54, 56-57, and 59-64 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The specification does not adequately support the amendment for all independent claims.

19. Claim 45 is also rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant

art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The term “computer program product” was not disclosed in the originally filed specification.

### **Claim Rejections - 35 USC § 101**

20. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

21. Claims 45 – 54, 56, 57, and 59 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter since it fails to be limited to embodiments which fall within a statutory category.

22. Claim 45 recites, “a computer program product... comprising a computer readable storage medium, first program instructions, second program instructions and third program instructions” in lines 1-4, 11, and 15.

23. In specification, P. 4, lines 10-20, recite as follows: “Computer-readable medium” means any carrier wave, signal or transmission facility for communication with computers and any kind of computer memory....” In specification, P. 20, lines 5-25, recite as follows: “One of the preferred implementations of the program is an application, namely a set of instructions (program code) in a code module.... The set of instructions may be stored in another computer memory... or downloaded via the Internet or other computer network. Thus, the present invention may be implemented as a computer-readable medium having computer-executable instructions....” The particular phrase "computer readable storage medium" cannot be found in the specification.

24. In view of the above, applicant has provided intrinsic evidence of embodiments such as signals and carrier waves to be included in the meaning. A transitory, non-propagating signal is not a process, machine, manufacture or composition of matter. Those four categories define the explicit scope and reach of subject matter patentable under 35 USC 101; thus, such a signal cannot be patentable subject matter (see *In re Nuijten*, 500 F. 3d 1346 1356 n7 (Fed Cir 2007)). In view of the above analysis, claim 45 is ineligible for patent protection as failing to be limited to embodiments which fall within a statutory category.

25. Claims 46 – 54, 56, 57, and 59 are also rejected since they are dependant on the rejected claim set forth.

### **Claim Rejections - 35 USC § 103**

22. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

23. Claims 1, 3-7, 9, 12, 16, 17, 19-21, 23, 26, 29, 30, 32-36, 38, 41, 45, 47-51, 53, and 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hershey et al. (5,793,753) in view of Chandra et al. (6,397,359).

24. For claim 1, Hershey teach a method (abstract) for communicating performance information (col. 1, line 1 – col. 2, line 55), said method comprising:

a. Configuring a plurality of probes (col. 3, lines 28 – 60; array of probes) to execute a plurality of steps representing an interaction between a user of a client computing device and one or more applications running on the server computing device, which

together are treated as a single unit (col. 4, lines 30-44; programmable probe collects device information through a plurality of steps between client and server);

b. Collecting data from the plurality of probes (col. 4, lines 44-60; monitoring network functions), including at least one local probe and at least one remote probe (Fig. 2; col. 3, lines 10-50; communication with probes); and

c. Reporting said data (col. 2, lines 50-55; response to interpreter), wherein reporting said data comprises generating a report regarding transaction activities (col. 5, lines 30-40; screen displays, workstation software).

25. Hershey does not expressly disclose configuring a plurality of probes to execute a script for performing a transaction, wherein the script comprises a plurality of transaction steps for performing the transaction. Hershey does not expressly disclose that the collected data is data representative of a performance of the transaction steps of the script executed by the plurality of probes, nor that the report comprises a plurality of transaction step entries, one entry for each transaction step of the script, having associated performance data collected from one or more of the at least one local probe or the at least one remote probe. Chandra teaches a method and system (abstract) of performance monitoring and network testing (col. 1, line 1 – col. 5, line 30) between local and remote probes (col. 6, line 29 – col. 7, line 15; nodes), wherein the script comprises a plurality of transaction steps for performing the transaction (col. 7, line 15 – col. 8, line 22; test scripts are developed and sent to each node). More specifically, Chandra teaches that the collected data (col. 8, lines 22-35; collected; col. 10, lines 60-61; storage) is data representative of a performance of the transaction steps of the script executed by the plurality of probes (col. 16, line 20 - col. 18, line 35; reported in association with specific script commands),

and that the report (col. 13, lines 10-11) comprises a plurality of transaction step entries, one entry for each transaction step of the script (col. 16, line 20 - col. 18, line 35; reported in association with specific script commands), having associated performance data collected from one or more of the at least one local probe or the at least one remote probe (col. 3, lines 45-47; local and remote views). At the time the invention was made, one of ordinary skill in the art would have added Chandra script and reporting methods to Hershey to improve the monitoring process by allowing for new or custom applications (col. 1, line 54 – col. 2, line 10).

26. For claim 30, Hershey teach a system (abstract) for communicating performance information (col. 1, line 1 – col. 2, line 55), said method comprising:

- a. a plurality of probe computers (col. 3, lines 28 – 60; array of probes) executing a plurality of steps representing an interaction between a user of a client computing device and one or more applications running on the server computing device, which together are treated as a single unit (col. 4, lines 30-44; programmable probe collects device information through a plurality of steps between client and server);
- b. one or more database storage devices that collect data from the plurality of probes (col. 4, lines 44-60; monitoring network functions), including at least one local probe and at least one remote probe (Fig. 2; col. 3, lines 10-50; communication with probes); and
- c. a report generator that reports said data (col. 2, lines 50-55; response to interpreter), wherein reporting said data comprises generating a report that comprises a plurality of transaction step entries (col. 5, lines 30-40; screen displays, workstation software).

27. Hershey does not expressly disclose configuring a plurality of probes to execute a script for performing a transaction, wherein the script comprises a plurality of transaction steps for performing the transaction. Hershey does not expressly disclose that the collected data is data representative of a performance of the transaction steps of the script executed by the plurality of probes, nor that the report comprises a plurality of transaction step entries, one entry for each transaction step of the script, having associated performance data collected from one or more of the at least one local probe or the at least one remote probe. Chandra teaches a method and system (abstract) of performance monitoring and network testing (col. 1, line 1 – col. 5, line 30) between local and remote probes (col. 6, line 29 – col. 7, line 15; nodes), wherein the script comprises a plurality of transaction steps for performing the transaction (col. 7, line 15 – col. 8, line 22; test scripts are developed and sent to each node). More specifically, Chandra teaches that the collected data (col. 8, lines 22-35; collected; col. 10, lines 60-61; storage) is data representative of a performance of the transaction steps of the script executed by the plurality of probes (col. 16, line 20 - col. 18, line 35; reported in association with specific script commands), and that the report (col. 13, lines 10-11) comprises a plurality of transaction step entries, one entry for each transaction step of the script (col. 16, line 20 - col. 18, line 35; reported in association with specific script commands), having associated performance data collected from one or more of the at least one local probe or the at least one remote probe (col. 3, lines 45-47; local and remote views). At the time the invention was made, one of ordinary skill in the art would have added Chandra script and reporting methods to Hershey to improve the monitoring process by allowing for new or custom applications (col. 1, line 54 – col. 2, line 10).

28. For claim 45, Hershey teach a computer program product (abstract) for communicating performance information (col. 1, line 1 – col. 2, line 55), said method comprising:

- a. A computer readable storage medium (col. 4, line 40 – col. 6, line 15; executable module on workstation);
- b. First program instructions to configure a plurality of probes (col. 3, lines 28 – 60; array of probes) to execute a plurality of steps representing an interaction between a user of a client computing device and one or more applications running on the server computing device, which together are treated as a single unit (col. 4, lines 30-44; programmable probe collects device information through a plurality of steps between client and server);
- c. Second program instructions to collect data from the plurality of probes (col. 4, lines 44-60; monitoring network functions), including at least one local probe and at least one remote probe (Fig. 2; col. 3, lines 10-50; communication with probes); and
- d. Third program instructions to report said data (col. 2, lines 50-55; response to interpreter), wherein reporting said data comprises generating a report regarding transaction activities (col. 5, lines 30-40; screen displays, workstation software).

29. Hershey does not expressly disclose configuring a plurality of probes to execute a script for performing a transaction, wherein the script comprises a plurality of transaction steps for performing the transaction. Hershey does not expressly disclose that the collected data is data representative of a performance of the transaction steps of the script executed by the plurality of probes, nor that the report comprises a plurality of transaction step entries, one entry for each transaction step of the script, having associated performance data collected from one or more of

the at least one local probe or the at least one remote probe. Chandra teaches a method and system (abstract) of performance monitoring and network testing (col. 1, line 1 – col. 5, line 30) between local and remote probes (col. 6, line 29 – col. 7, line 15; nodes), wherein the script comprises a plurality of transaction steps for performing the transaction (col. 7, line 15 – col. 8, line 22; test scripts are developed and sent to each node). More specifically, Chandra teaches that the collected data (col. 8, lines 22-35; collected; col. 10, lines 60-61; storage) is data representative of a performance of the transaction steps of the script executed by the plurality of probes (col. 16, line 20 - col. 18, line 35; reported in association with specific script commands), and that the report (col. 13, lines 10-11) comprises a plurality of transaction step entries, one entry for each transaction step of the script (col. 16, line 20 - col. 18, line 35; reported in association with specific script commands), having associated performance data collected from one or more of the at least one local probe or the at least one remote probe (col. 3, lines 45-47; local and remote views). At the time the invention was made, one of ordinary skill in the art would have added Chandra script and reporting methods to Hershey to improve the monitoring process by allowing for new or custom applications (col. 1, line 54 – col. 2, line 10).

30. For claims 3, 32, 47, Hershey teaches that said reporting further comprises outputting a plurality of items chosen from: response time data, availability data, probe location, Internet Service Provider information, time of script execution, threshold values, service level agreement violations, and error messages (col. 4, lines 44-60; monitor network functions and conditions).

31. For claims 4, 33, 48, Hershey does not expressly disclose comparing said data with at least one threshold value derived from a service level agreement, and reporting results of said comparing. Chandra teaches comparing said data with at least one threshold value derived from

a service level agreement, and reporting results of said comparing (col. 14, line 39 – col. 15, line 16; service level agreement monitoring). At the time the invention was made, one of ordinary skill in the art would have added Chandra's monitoring and comparison system to the Hershey monitoring and comparison system for the reasons provided in the claim 1 discussion above and further in order to provide a system of improved analysis independent of certain factors (col. 14, lines 63-67). Regarding claim 48, the embodiment of this method as program instructions is shown in the claim 45 discussion.

32. For claims 16, 26, Hershey teach a method (abstract) for communicating performance information (col. 1, line 1 – col. 2, line 55), said method comprising:

- a. Configuring at least one probe (col. 3, lines 28 – 60; array of probes) to execute a plurality of steps representing an interaction between a user of a client computing device and one or more applications running on the server computing device, which together are treated as a single unit (col. 4, lines 30-44; programmable probe collects device information through a plurality of steps between client and server);
- b. Receiving data from at least one probe (col. 4, lines 44-60; monitoring network functions); and
- c. Reporting said data (col. 2, lines 50-55; response to interpreter), wherein reporting said data comprises generating a report regarding transaction activities (col. 5, lines 30-40; screen displays, workstation software).

33. Hershey does not expressly disclose configuring a plurality of probes to execute a script for performing a transaction, wherein the script comprises a plurality of transaction steps for performing the transaction. Hershey does not expressly disclose that the collected data is data

representative of a performance of the transaction steps of the script executed by the plurality of probes, nor that the report comprises a plurality of transaction step entries, one entry for each transaction step of the script, having associated performance data collected from one or more of the at least one local probe or the at least one remote probe. Chandra teaches a method and system (abstract) of performance monitoring and network testing (col. 1, line 1 – col. 5, line 30) between local and remote probes (col. 6, line 29 – col. 7, line 15; nodes), wherein the script comprises a plurality of transaction steps for performing the transaction (col. 7, line 15 – col. 8, line 22; test scripts are developed and sent to each node). More specifically, Chandra teaches that the collected data (col. 8, lines 22-35; collected; col. 10, lines 60-61; storage) is data representative of a performance of the transaction steps of the script executed by the plurality of probes (col. 16, line 20 - col. 18, line 35; reported in association with specific script commands), and that the report (col. 13, lines 10-11) comprises a plurality of transaction step entries, one entry for each transaction step of the script (col. 16, line 20 - col. 18, line 35; reported in association with specific script commands), having associated performance data collected from one or more of the at least one local probe or the at least one remote probe (col. 3, lines 45-47; local and remote views). At the time the invention was made, one of ordinary skill in the art would have added Chandra script and reporting methods to Hershey to improve the monitoring process by allowing for new or custom applications (col. 1, line 54 – col. 2, line 10).

34. Hershey does not expressly disclose comparing said data with at least one threshold value derived from a service level agreement, and reporting results of said comparing. Chandra teaches comparing said data with at least one threshold value derived from a service level agreement, and reporting results of said comparing (col. 14, line 39 – col. 15, line 16; service

level agreement monitoring). At the time the invention was made, one of ordinary skill in the art would have added Chandra's monitoring and comparison system to the Hershey monitoring and comparison system for the reasons provided in the discussion above and further in order to provide a system of improved analysis independent of certain factors (col. 14, lines 63-67).

35. For claims 17, 29, Hershey further comprises a plurality of probes, including at least one local probe and at least one remote probe (Fig. 2; col. 3, lines 10-50; communication with probes).

36. For claims 5, 19, 34, 49, Hershey teaches providing an alert when said data indicates an error (Fig. 4, #47; col. 5, lines 55-60; alarm log).

37. For claims 6, 20, 35, 50, Hershey teaches that said error is a measured response time value greater than a corresponding threshold value (col. 3, line 60 – col. 4, line 9; parameter value vs. reference value).

38. For claims 7, 21, 36, 51, Hershey teaches that said alert is provided via a system management computer (col. 3, lines 50-60; col. 4, lines 10-20).

39. For claims 9, 23, 38, 53, Hershey teaches outputting in a special mode any measured response time value that is greater than the corresponding threshold value (col. 3, line 65 – col. 4, line 1; “appropriate display”).

40. For claims 12, 41, 56, Hershey teaches outputting in a special mode an indication of an application’s lack of availability (col. 4, lines 49-50; alarm condition = loss of signal).

41. Claims 2, 8, 10, 13, 15, 18, 22, 24, 27, 31, 37, 39, 42, 44, 46, 52, 54, 57, and 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hershey and Chandra as applied to claims 1, 16, 30, 45 above, and further in view of Schwaller et al. (6,901,442).

42. For claims 2, 18, 31, 46, Hershey teaches that said reporting further comprises reporting a first subset of said data that originates from said at least one local probe (Fig. 2, #22a), and reporting a second subset of said data that originates from said at least one remote probe (Fig. 2, #22b). Hershey and Chandra do not expressly disclose employing a similar reporting format for said first subset and said second subset, whereby comparison of said first subset and said second subset is facilitated. Schwaller teaches a method (abstract) of monitoring network nodes and reporting performance data (col. 1, line 1 – col. Col. 6, line 20) in which the reporting method employs a similar reporting format for said first subset and said second subset (Fig. 9B), whereby comparison of said first subset and said second subset is facilitated (col. 14, lines 5-20). At the time the invention was made, one of ordinary skill in the art would have used Schwaller's GUI to improve reporting methods and further to allow administrators to better study data and locate problems (col. 15, lines 20-55).

43. For claims 8, 22, 37, 52, Hershey and Chandra do not expressly disclose providing a clearing message when said error no longer is detected. Schwaller teaches the negation of error messages when trend measurements indicate improvement for the error message (col. 20, lines 35-45). At the time the invention was made, one of ordinary skill in the art would have added the clearing of error messages to Hershey and Chandra so that administrators may know which problems require attention (col. 17, lines 30-35).

44. For claims 10, 13, 24, 27, 39, 42, 54, 57, Hershey and Chandra do not expressly disclose that outputting in a special mode further comprises outputting in a special color. Schwaller teaches this limitation (col. 13, lines 55-65). At the time the invention was made, one of ordinary skill in the art would have added color coding to make error determination easier for administrators (col. 3, lines 3-5).

45. For claims 15, 44, 59, Hershey does not expressly disclose reporting results of each execution of the script by said plurality of probes, but does teach that the probes are programmable as to monitoring of the system (col. 5, lines 10-40). Schwaller teaches the reporting of test script results (col. 9, lines 30-50). At the time the invention was made, one of ordinary skill in the art would have added scripting in order to perform traffic simulation (col. 7, line 55 – col. 8, line 50) that is well known in legacy systems (col. 2, lines 20-35).

46. Claims 60-64 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hershey, Chandra, and Schwaller as applied to claims 15, 16, 26, 44, and 59 above, and further in view of Wlaschin et al. (6,163,775).

47. For claims 60-64, Hershey teaches outputting the reported results to a user (col. 5, lines 30-40), but does not expressly disclose the output of the report comprises a table. Chandra teaches a table report (Tables 3 and 4), but does not expressly disclose a table having at least one row for each execution of the script and columns ordered according to an order of transaction steps in the script. Wlaschin teaches a method and system (abstract) of utilizing tables to report data (col. 1, line 1 – col. 3, line 30), wherein a structure of such type is utilized (col. 6, line 35 – col. 7, line 30) to store data of any type (abstract).

48. The remaining differences are only found in the non-functional data stored on the article of manufacture. Monitoring data and specific labels is not functionally related to the substrate of the article of manufacture. Thus, this descriptive material will not distinguish the claimed invention from the prior art in terms of patentability, see Cf. In re Gulack, 703 F.2d 1381, 1385, 217 USPQ 401, 404 (Fed. Cir. 1983); In re Lowry, 32 F.3d 1579, 32 USPQ2d 1031 (Fed. Cir. 1994).

49. Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to store any data in the fields of the article of manufacture as shown in Wlaschin because such data does not functionally relate to the substrate of the article of manufacture and merely labeling the data differently from that in the prior art would have been obvious matter of design choice. See In re Kuhle, 526 F.2d 553, 555, 188 USPQ 7, 9 (CCPA 1975).

50. At the time the invention was made, one of ordinary skill in the art would have used Wlaschin to order the data from Hershey and Chandra in order to improve functionality such as results searching (col. 1, line 66 – col. 2, line 10).

### **Conclusion**

37. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MELVIN H. POLLACK whose telephone number is (571)272-3887. The examiner can normally be reached on 8:00-4:30 M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ian Moore can be reached on (571) 272-3085. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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/Melvin H Pollack/  
Examiner, Art Unit 2469  
09 November 2010

/Ian N. Moore/  
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